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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Plumas)**

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY PATRICK KORTANGIAN,

Defendant and Appellant.

C059353

(Super. Ct. No. 07-34798)

In October 2007, a Plumas County Sheriff's Department deputy was dispatched to a residence in Portola regarding a physical altercation.¹ The victim was bleeding badly from a laceration above her right eye. She told the deputy that her husband, defendant Kelly Patrick Kortangian, had tried to choke her and had struck her in the head with a bottle of tequila during a dispute over his desire to use her car. Defendant had previously been convicted of misdemeanor domestic violence against the same victim.

¹ Because the matter was resolved by plea, our statement of facts is taken from the probation officer's report.

Defendant pleaded no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)--count I)² and infliction of corporal injury on a spouse by a person previously convicted of domestic violence (§ 273.5, subd. (e)(1)--count II). He admitted enhancing allegations that he inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) in the commission of both counts.

Defendant was sentenced to state prison for seven years (the midterm of four years on count II plus the lower term of three years for the enhancement). Sentence on count I (and its enhancement) was stayed pursuant to section 654. Defendant was awarded 97 days of custody credit and 14 days of conduct credit. He was ordered to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a \$200 restitution fine suspended unless parole is revoked (§ 1202.45), and a \$20 court security fee (§ 1465.8) on count II; an identical fee on count I was stayed.

This court granted defendant's motion for relief from untimely filing of the notice of appeal. The trial court denied his request for a certificate of probable cause.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel

² Undesignated statutory references are to the Penal Code.

of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed supplemental briefs contending (1) his *Marsden*³ motion, made the day prior to the plea, was erroneously denied; (2) his trial counsel "denied [him his] right" to withdraw his plea; (3) his counsel failed to challenge the evidence supporting the great bodily injury enhancement; (4) he was denied access to unspecified paperwork until after the time of sentencing; (5) he was coerced into entering his plea; (6) he was not advised how the enhancement allegations would affect his sentence; and (7) in taking his admission of the prior domestic violence conviction, the trial court erroneously termed that offense a felony rather than a misdemeanor.

Each of these contentions challenges the validity of the plea and cannot be raised without a certificate of probable cause. (§ 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1098-1099; *People v. Panizzon* (1996) 13 Cal.4th 68, 74-75.) The trial court's denial of a certificate of probable cause precludes our consideration of these arguments.

This leaves defendant's contention that "[o]ne strike on record was supposed to be dropped but instead was stayed under [section] 654," giving him "[two] strikes and a 85% of seven year sentence." Because the prosecution did not allege any prior strikes, we construe defendant's remarks as an assertion

³ *People v. Marsden* (1970) 2 Cal.3d 118.

that one of his two *present* convictions (which could be alleged as strikes in future cases) was to be dismissed rather than stayed pursuant to section 654. We further construe the remarks as contending that this was to have been done *at sentencing*; so construed, the claim does not affect the validity of the plea and is cognizable notwithstanding the denial of a certificate of probable cause.

However, before the trial court took defendant's plea, it advised him: "There's no offer. This is what is known as an open plea. In other words, what's going to happen here is if you plead guilty to what is known as the sheet, both counts, and admit the enhancement, the great bodily injury enhancement, your maximum sentence allowable by law would be [10] years in state prison with the understanding that you could not be sentenced on both charges--you could be sentenced on both charges, but they would merge under [section] 654 of the Penal Code."

The remarks that there was "no offer"; that defendant was making an "open plea," or a plea to "the sheet, both counts"; and that sentence on the counts would "merge under [section] 654 of the Penal Code," make plain that there was no *agreement or understanding* that one present conviction would be dropped rather than stayed. Defendant cites no evidence raising a contrary inference, and we have found none.

The only possible suggestion that one present count may somehow be "dropped" arose from the trial court's advisement of the consequences of the plea.

Because defendant admitted great bodily injury enhancements on both counts, both were violent felonies and both could be alleged as strikes in future cases even though sentence on one was to be stayed under section 654. (§§ 667, subd. (d)(1), 667.5, subd. (c)(8); *People v. Benson* (1998) 18 Cal.4th 24, 26-27, 31-36.)

But in advising defendant of the consequences of his plea, the trial court told him, "what you're pleading to here will constitute one strike," rather than two; and that it "could double the term," rather than result in a term of 25 years to life.

The trial court thus advised defendant of the consequences that flow from one prior strike, not the much more drastic consequences that flow from two prior strikes. The advisement was consistent with *People v. Burgos* (2004) 117 Cal.App.4th 1209, which held that where, as here, two prior convictions arise from the same single act, and both are alleged as strikes in a subsequent case, the failure to dismiss one allegation in the subsequent case is an abuse of discretion.⁴ (*Id.* at pp. 1214-1217.) Thus, if both present convictions are alleged as strikes in a future case, the future court will have a duty

⁴ Defendant raised this issue in a petition for writ of habeas corpus in the trial court. That petition was denied on January 5, 2009. Defendant then raised the issue by petition for writ of habeas corpus in this court. We denied the latter petition on February 11, 2009 (C060857).

to dismiss one allegation; the resulting consequences of this plea will conform to the explanation given by the trial court.

Our examination of the record discloses that the abstract of judgment must be corrected to reflect that defendant's conduct credit was calculated pursuant to section 2933.1, not section 4019.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect conduct credits calculated per section 2933.1. A certified copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

RAYE, Acting P. J.

HULL, J.